[redacted]

In The

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING CODE COUNCIL, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

[redacted] OXFORD HOUSE, INC.,
[redacted] AND TERRI HAMILTON

[redacted]

[redacted]

[redacted]

QUESTION PRESENTED

Whether the City of Edmonds' zoning ordinance permitting any number of related persons, but no more than five unrelated persons, to reside in a house in a single family zone is exempt from the Fair Housing Act under 42 U.S.C. § 3607(b)(1), which provides that nothing in the Act "limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

LIST OF PARTIES AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, the parties below included respondents Oxford House, Inc., Oxford House-Edmonds, Herb Hamilton, and the United States of America. Oxford House, Inc. has no parent company or subsidiaries. Respondent Washington State Building Code Council was dismissed by order of the district court. Pet. Br. at 6.

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BRIEF FOR RESPONDENTS OXFORD HOUSE, INC., OXFORD HOUSE-EDMONDS, AND HERB HAMILTON

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A) is reported at 18 F.3d 802 (1994). The Judgment and Order of the United States District Court for the Western District of Washington (Pet. App. B) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 14, 1994. The petition for a writ of certiorari was filed on June 9, 1994 and was granted on October 31, 1994. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES AND ORDINANCES INVOLVED

42 U.S.C. § 3607 sets forth exemptions to the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* It provides, in

pertinent part: "(b) Numbers of occupants; * * * (1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

Relevant portions of the City of Edmonds Community Development Code are set forth in the Joint Appendix at 187-250.

STATEMENT

This case involves the efforts of a group of 10 to 12 individuals, who are handicapped within the meaning of the Fair Housing Amendments Act of 1988, to live together in one house in a particular area in the City of Edmonds, Washington. An Edmonds zoning ordinance stands in the way. The respondents, including the United States, contend that the application of the ordinance in this case may be challenged under the Fair Housing Act. The City claims that the ordinance is exempt from the Act under 42 U.S.C. § 3607(b)(1), set forth above.

1. The Statutory Scheme.

a. *Overview.* The Fair Housing Act ("the Act") was enacted as Title VIII of the Civil Rights Act of 1968. Pub. L. No. 90-284, Apr. 11, 1968, 82 Stat. 81, codified at 42 U.S.C. §§ 3601 *et seq.* Initially the Act outlawed discrimination in the sale or rental of housing "because of race, color, religion, or national origin." Pub. L. No. 90-284, 82 Stat. 73, 83. It was amended in 1974 to prohibit housing discrimination because of sex as well. Pub. L. No. 93-383, Aug. 22, 1974, 88 Stat. 633, 729. In the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, Sept. 13, 1988, 102 Stat. 1619 ("the FHAA"), Congress forbade discrimination based on handicap or familial status.

b. *Discrimination based on handicap.* The FHAA borrowed the definition of "handicap" from the Rehabilitation Act of 1973. See 29 U.S.C. § 706(8)(B) (Supp. V 1993). Thus "handicap" means—

> "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
>
> "(2) a record of having such an impairment, or
>
> "(3) being regarded as having such an impairment,
>
> "but such term does not include current, illegal use of or addiction to a controlled substance as defined in section 802 of Title 21." 42 U.S.C. § 3602(h)(1)-(3).

The Secretary of Housing and Urban Development, who has general authority to administer the Act, *id.* § 3608, has interpreted the term "[p]hysical or mental impairment" to include "drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism." 24 C.F.R. § 100.201(a)(2)(1994).[1]

Subject to § 3607(b)(1) and other exemptions not relevant here, the FHAA provides that "it shall be unlawful—"

> "(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of [the buyer or renter] * * *.
>
> "(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of [that person] * * *." 42 U.S.C. § 3604(f)(1)-(2).

In addition, the FHAA provides extra protections for handicapped persons by defining "discrimination" to include, among other things, "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford

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[1] Recovering alcoholics and addicts are also "handicapped" under § 504 of the Rehabilitation Act. See, *e.g.*, *United States* v. *Southern Management Corp.*, 955 F.2d 914, 919 (4th Cir. 1992); *Sullivan* v. *City of Pittsburgh*, 811 F.2d 171, 182 (3d Cir. 1987).

such [handicapped] person equal opportunity to use and enjoy a dwelling." *Id.* § 3604(f)(3)(B); see also *id.* § 3604(f)(3)(A), (C).

c. *Enforcement.* Persons aggrieved by discriminatory housing practices may file suit in federal or State court. *Id.* § 3613. Alternatively, they may file a complaint with the Secretary of Housing and Urban Development. The Secretary may thereafter issue a charge, which will be resolved through an administrative hearing subject to federal court of appeals review unless the complainant or the respondent elects to have the charge resolved in a civil action in federal district court, in which case the Secretary "shall authorize" and the Attorney General "shall commence" the action on behalf of the aggrieved person. See *id.* §§ 3610(g), 3612.

If, however, "the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 3614 * * *." *Id.* § 3610(g)(2)(C). Section 3614 empowers the Attorney General to commence a civil action in federal district court on matters referred by the Secretary and independently to bring a civil action against a person or group engaged in a pattern or practice of resistance to the rights conferred by the Act. *Id.* §§ 3614(a), (b)(1)(A).

Finally, § 3615 provides that any State or local law "that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."

2. Oxford House, Inc.

Respondent Oxford House, Inc., is a nonprofit corporation acting as an umbrella organization for over three hundred private, self-run, financially-independent houses for men and women recovering from alcohol or drug addiction. Jt. App. at 116; see also U.S. Dep't of Health and Human Services, *Self-Run, Self-Supported Houses for More Effective Recovery from Alcohol and Drug Addiction—A Technical Assistance Manual* 11 (1990) (hereinafter "HHS Technical Manual").[2] Since 1975 it has provided guidance and, upon satisfaction of certain standards, granted charters to groups interested in starting their own "Oxford House." Jt. App. at 116-19. Individuals wishing to start an Oxford House must agree to establish a single-sex home that will be democratically self-run, financially self-supporting, and completely free of drugs and alcohol. HHS Technical Manual 13-14. The home will receive an Oxford House Charter if after 90 days the members have established a house checking account, elected officers, held at least eight weekly meetings, received two recommendation letters from local recovery programs such as Alcoholics Anonymous, and submitted six weekly financial reports. *Id.* App. A at 1, 3.

The members of an Oxford House live together essentially as a family of adults. They share equally in the payment for rent, utilities, and food staples and in the upkeep and maintenance of the house. Jt. App. at 117. They meet weekly to discuss household affairs. HHS Technical Manual 1, 11, 23-27. Oxford Houses are not staffed by government social workers and employ no rehabilitation counselors, managers, or support staffs.

Oxford House residents must refrain completely from alcohol and drugs, both in and out of the house. HHS Technical Manual App. C at 4-5, 13.[3] A single lapse brings immediate expulsion: no second chances or probationary periods are allowed. *Id.* App. C at 30. This uncompromising approach is essential to the sustained recovery of the residents. *Id.* App. C at 4-5.

Residents who remain alcohol and drug free may continue to live at an Oxford House for as long as they wish.

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[2] The HHS Technical Manual was attached to the City's Memorandum in Support of Motion for Summary Judgment in the district court. See R. 45. Citations to "R. ——" refer to the district court Record docket entries in the Joint Appendix at 23-37.

[3] Appendix C to the HHS Technical Manual is the *Oxford House Manual*, parts of which are reprinted in the Joint Appendix at 167-72.

Jt. App. at 117. Some residents stay for three years or more; the average length of stay is about thirteen months. HHS Technical Manual 5; *id.* App. G at 4.

Oxford Houses make every possible effort to rent homes in mature residential neighborhoods, for it is essential to the residents' sustained recovery that they live in an environment far removed from opportunities for drug and alcohol abuse. HHS Technical Manual 16, 18-19. Residents also seek a house near public transportation so that those without cars may readily commute to and from work. *Id.* at 19. And an Oxford House must accommodate at least six residents to ensure financial self-sufficiency and to provide the mutual support necessary for recovery from alcohol and drug abuse. Jt. App. at 103, 107.[4]

The expression "recovering alcoholics and drug addicts" is misleading insofar as it suggests that Oxford House residents are not "recovered" or "former" alcoholics and addicts. Even former alcoholics and addicts who have not touched liquor or drugs for years routinely refer to themselves as "recovering" in recognition of their continued vulnerability and need for vigilance. And in fact, although the residents of Oxford Houses are recovering alcoholics and drug addicts, those houses are probably among the very few, in the hundreds of communities in which they are found, in which no one drinks or takes drugs.

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[4] The Washington state official responsible for facilitating the establishment of self-run, self-supported houses for recovering alcoholics and addicts in Washington communities said this about household size:

> "Stability is a major reason for the success of the Oxford House program and an important reason Oxford Houses remain stable is due largely to the number of individuals required to make them work, both financially and programmatically. Fewer individuals would have a definite negative impact on the ability of a house to maintain a core group throughout [transition periods] and would surely jeopardize their success and existence." Jt. App. at 58.

3. The Anti-Drug Abuse Act.

Recognizing the success of the Oxford House approach, Congress encouraged the establishment of self-run, self-supported recovery houses in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. II, § 2036, 102 Stat. 4181, 4202 (codified as amended at 42 U.S.C. § 300x-25 (Supp. V 1993)) (reproduced in Jt. App. at 185-86). In Title II of that Act, Congress enacted a variety of treatment and prevention measures, among them the promotion of group recovery homes modeled after Oxford House, to "continue the Federal Government's partnership with the States in the development, maintenance, and improvement of community-based alcohol and drug abuse programs." 42 U.S.C. § 201 note (Supp. V 1993). Congressman Edward Madigan, one of the sponsors of the group home provision, stated: "Self-run and self-supported addiction recovery houses—such as Oxford House—hold out great promise as a cost-effective way to help addicted individuals who want to recover." 134 Cong. Rec. E3732 (daily ed. Nov. 10, 1988).

Under the Act, States receiving federal block grant funds for substance abuse and mental health services must establish a revolving fund of at least $100,000 for start-up loans for group recovery houses. 42 U.S.C. § 300x-25(a). To qualify for a loan from the fund, a house must have at least six residents, all of whom must agree (1) to prohibit the use of alcohol or illegal drugs; (2) immediately to expel any resident who uses drugs or alcohol; (3) to share all costs of the housing; and (4) to establish the rules of the house through majority vote. *Id.* § 300x-25(a)(6)(A)-(D). Loans are typically used for advance rental payments or security deposits and must be repaid within two years. *Id.* § 300x-25(a)(4).

The State of Washington provides start-up loans under this legislation. Jt. App. at 57. Its Department of Social and Health Services ("DSHS") contracted with Oxford House, Inc., to assist in the administration of the loan fund and to provide technical assistance in establishing Oxford Houses in the State. *Id.* at 119. As of 1992, the

DSHS had made start-up loans to seventeen Oxford Houses. *Id.* at 57.

4. The Establishment of Oxford House-Edmonds.

Respondent Oxford House-Edmonds began in July of 1990 with a start-up loan from the DSHS and the assistance of Mark Spence, a representative of Oxford House, Inc., who was under contract with the DSHS. *Id.* at 57-59, 102-03. After looking at a number of houses in Edmonds, Mr. Spence ended up renting the one he had seen first because it has six bedrooms that can accommodate at least ten residents, is near public transportation, and is located in a residential neighborhood with a low crime rate and no evidence of drug trafficking. *Id.* at 94, 103-04.

For purposes of this litigation the parties have stipulated to the following facts about Oxford House-Edmonds and its residents:

1. The residents are handicapped persons within the meaning of the Act and live together as a single housekeeping unit. *Id.* at 105-06.
2. They do not drink or take drugs. *Id.*
3. Apart from some early concerns related to zoning, the residents have fit smoothly into the neighborhood, generating no complaints about their behavior. *Id.* at 108.
4. Oxford House-Edmonds must maintain at least six residents to preserve financial self-sufficiency and to achieve a supportive group environment for recovery; with any fewer residents the House could not viably operate at its current location. *Id.* at 107.
5. The effect of the House on city services and infrastructure is qualitatively and quantitatively the same as the effect of an equally-sized family of related persons of the same age at the same location. *Id.* at 110.

5. The City's Response.

On July 20, 1990, the City asserted that the residents of Oxford House-Edmonds were in violation of the Edmonds Community Development Code ("ECDC").[5] The ECDC permits only a "family" to live in areas zoned for single-family residences and defines a "family" to be an unlimited number of related persons or five or fewer unrelated persons. Jt. App. at 106-07, 250. That ordinance has the effect of excluding Oxford House-Edmonds from 97 percent of the rental housing available in the City. (See note 27, *infra.*) The residents requested that the City grant them a "reasonable accommodation" under § 3604(f)(3)(B) of the FHAA by waiving the unrelated persons rule in their case, but the City refused.[6]

Oxford House, Inc., thereupon filed a complaint with the Secretary of Housing and Urban Development. Jt. App. at 64. The City sought a declaratory judgment in federal district court that its ordinance is exempt from the Act. *Id.* at 40, 107. Oxford House, Inc., counterclaimed, asserting that the City had violated the Act by refusing to make a reasonable accommodation under § 3604 (f)(3)(B). *Id.* at 60, 76. The United States filed a separate action against the City alleging the same violation. The two cases were consolidated.

6. The Decisions Below.

On stipulated facts and cross-motions for summary judgment, the district court held that the City's ordinance is exempt from the Act under § 3607(b)(1). Pet. App. B at 7-10. The court noted that the City could have made a reasonable accommodation by "agreeing to waive the five-person limit as to Oxford House-Edmonds" (*id.*

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[5] Letter of July 20, 1990 from Edmonds Assistant City Planner to Mark Spence (R. 51, Memorandum by the United States in Support of Motion for Partial Summary Judgment, Appendix, Tab 2).

[6] Letter of July 24, 1990 from Edmonds City Attorney to Mark Spence (R. 51, Tab 3).

at 9), but ruled that the Act did not require the City to do so because its ordinance was exempt. *Id.* at 11-12.

The court of appeals reversed. It held that § 3607 (b)(1) does not exempt single family use restrictions such as the City's zoning ordinance but instead exempts only occupancy restrictions that apply uniformly to all residents, related and unrelated. Pet. App. A at 2554, 2557-58. The court rejected the City's construction because, if accepted, it would "undermine the purposes" of the Act by insulating all "single-family residential zones from the sweep of FHAA requirements." *Id.* at 2562. Accordingly, the court of appeals remanded for consideration of respondents' claim that the City violated the Act by refusing to make a reasonable accommodation in its ordinance so as to permit the residents of Oxford House-Edmonds to remain in their current location. *Id.* at 2566-67.

SUMMARY OF ARGUMENT

I.

Section 3607(b)(1) exempts from the Fair Housing Act "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." The City construes that exemption broadly to exempt single family zoning ordinances "in place in the majority of communities throughout the country." Pet. Br. at 6. The Ninth Circuit construed the exemption narrowly to reach only the kind of health and safety related occupancy restrictions that are commonly found in housing codes. In our view the words of the exemption, read by themselves, do not tell us which construction is correct. But when they are read in the context of the overall statutory scheme, and in light of other federal statutes that foster group homes such as Oxford Houses and that declare a "national interest" in offering certain handicapped persons "the opportunity, to the maximum extent feasible * * * to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens," the meaning of those

words emerges with unmistakable clarity. As we shall show, they cannot possibly be read to permit communities throughout the Nation to ban group homes for handicapped persons.

A. The Fair Housing Act was drafted in "broad and inclusive" language which is to be given a "generous construction" in order to carry out a " 'policy that Congress considered to be of the highest priority.' " *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212, 211 (1972) (citation omitted). The FHAA not only brought handicapped persons under the sweeping protections already existing in the Act but also conferred on them special protections not afforded any other covered class. It did so by defining "discrimination" to include, among other things, "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [handicapped] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B). That provision has been widely construed to require municipalities to make an exception to zoning ordinances when necessary to accommodate the housing needs of handicapped persons. The breadth of these antidiscrimination provisions favors the Ninth Circuit's narrow construction of § 3607(b)(1), which fosters the broad remedial purposes of the FHAA and follows the rule that exemptions to remedial statutes must "be narrowly construed." *A.H. Phillips Co.* v. *Walling*, 324 U.S. 490, 493 (1945).

B. Congress intended in the FHAA to reach zoning ordinances and knew that many of the handicapped persons on whom it was conferring fair housing rights need to live in group homes in residential neighborhoods. The original Act provided that inconsistent local laws were invalid, 42 U.S.C. § 3615, and Congress was well aware when it reenacted that provision without change in 1988 that many discriminatory municipal zoning ordinances had been held invalid under that provision. Moreover, the FHAA itself confers jurisdiction on the Attorney General over any matter involving "the legality of any State

or local zoning or other land use law or ordinance." 42 U.S.C. § 3610(g)(2)(C). Thus in enacting the FHAA Congress clearly meant for local zoning ordinances to continue to be covered by the Act.

By 1988 Congress had also recognized and endorsed the importance to handicapped persons of living in normal residential communities. Medical and social service professionals had come to understand that the institutionalization of disabled individuals exacerbates their difficulties, whereas integration into normal communities maximizes their ability to achieve their human potential. Congress encouraged the "deinstitutionalization" movement in 1984 when it enacted the Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 98-527, 98 Stat. 2662, to provide financial assistance to States to support persons with developmental disabilities "to achieve their maximum potential through increased independence, productivity and integration into the community." 42 U.S.C. § 6021. And in amending that Act in 1987 Congress found that "[i]t is in the national interest to offer persons with developmental disabilities the opportunity, to the maximum extent feasible, to make decisions for themselves and to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens." 42 U.S.C. § 6000(a)(9). Moreover, two months after enacting the FHAA, the same Congress enacted the Anti-Drug Abuse Act, which expressly supports group homes for recovering alcoholics and addicts such as Oxford Houses.

This context, when added to the overall policy of the FHAA and its express coverage of zoning ordinances generally, dooms the City's construction of § 3607(b)(1) to exempt ordinances that exist in "thousands [of cities] throughout our Nation." Pet. Br. at 8. Congress could not conceivably have intended that provision to permit all those communities to declare themselves off-limits to handicapped persons—whether mentally retarded, elderly, physically disabled, or recovering alcoholics and addicts—who need to live in group homes. The Ninth Circuit's

narrow construction, by contrast, preserves legitimate health and safety occupancy restrictions without excluding many handicapped persons from vast areas of the Nation's housing.

C. The Ninth Circuit's construction is also supported by the language of § 3607(b)(1), which is written in the terms of an "occupancy" restriction rather than a "use" restriction. The two differ. "Use" restrictions are embodied in zoning codes enacted "to divide the land into different districts, and to permit only certain uses within each zoning district," whereas "occupancy" restrictions are generally set forth in housing codes and among other things regulate "minimum space per occupant * * * to prevent overcrowding and the blighting of residential dwellings." 1 Rohan, *Zoning and Land Use Controls* §§ 1.102[1], 1.02[6][c] (1992) (footnote omitted). Use restrictions have often been used in a discriminatory manner to exclude disfavored classes of persons, whereas occupancy restrictions, because rooted in health and safety concerns, have been applied uniformly without regard to the different characteristics of the persons subject to their terms. The use of the words "occupants" and "occupy" in § 3607(b)(1) shows that Congress meant to exempt only true occupancy restrictions. The Secretary of Housing and Urban Development ("HUD"), charged with administering much of the Act, also believes that the kinds of restrictions Congress meant to exempt are those that are "based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit." 24 C.F.R. ch. I, subch. A, App. I.

In short, when it exempted "restrictions regarding the maximum number of occupants permitted to occupy a dwelling," Congress intended to adopt this common interpretation of maximum occupancy restrictions as establishing a maximum number of occupants based on the amount of space in the dwelling—regardless of the character of

that occupant—to prevent health and safety problems caused by overcrowding.

The City urges that its ordinance is exempt because, in defining families, it does limit the maximum number of unrelated people—albeit not related people—who may live in a house. But the statutory language does not suggest Congress' willingness to distinguish among categories of prospective occupants. Congress exempted only restrictions on "*the* maximum number of occupants," not the maximum number of *some* categories of occupants but not others, and not "*a*" maximum applicable to some but not all occupants. Hence the City's approach gives a dubious meaning to the words of § 3607(b)(1), construes an exemption to a remedial statute broadly rather than narrowly, and produces a result contrary to the Act's overall purposes.

D. Section 3607(b)(1)'s requirement that occupancy restrictions be "reasonable" also supports the Ninth Circuit's construction. If, as that court held, Congress meant only to exempt true "occupancy" restrictions, the reasonableness of any particular restriction may be readily determined by evaluating whether it serves the health and safety concerns commonly addresed in uniform housing codes. It is not so simple if Congress meant for § 3607 (b)(1) to exempt zoning ordinances like the City's. The City and its supporting *amici curiae* argue that the City's ordinance is reasonable because it is constitutional and supposedly does not discriminate against handicapped persons. But the adoption of a constitutional reasonableness standard would mean that the FHAA gave handicapped persons needing to live in group homes no protection the Constitution did not already provide; that Congress intended the Act to reach only unconstitutional ordinances; and that, contrary to Congress' intent, municipalities could exclude group homes for handicapped persons altogether. And the reasonableness of an ordinance under § 3607 (b)(1) cannot turn on whether it is discriminatory, for a nondiscriminatory ordinance by definition does not violate the Act and has no need for an exemption. Finally,

if "reasonable" does mean "nondiscriminatory," courts considering whether a restriction is exempt will have to resolve what are essentially merits issues regarding the discriminatory impact of the ordinance at issue. Thus the difficulty of discerning an appropriate test for the reasonableness of a zoning ordinance under § 3607(b)(1)—one that does not equate reasonableness with "constitutional" or "discriminatory" and that would not collapse the exemption issue into the merits—further supports the Ninth Circuit's construction.

E. The Ninth Circuit's interpretation if accepted will not "destroy the effectiveness and purpose of single family zoning." Pet. Br. at 25. If single family zoning ordinances are not exempt, it means only that they may be challenged under the Act's prohibitions against discrimination found in § 3604(f)(1)-(3). In this case the respondents claim that the City has violated § 3604(f)(3)(B) by refusing to make a reasonable accommodation in its ordinance for Oxford House-Edmonds. If the decision below is affirmed and respondents prove that claim on remand, the City will still remain free to enforce its ordinance against other group homes such as college fraternities and boarding houses.

F. The City and its supporting *amici* incorrectly contend that, because this Court in constitutional rulings has upheld the broad zoning powers of municipalities, Congress must have intended to exempt single family ordinances from the Fair Housing Act. Pet. Br. at 9-11. This argument ascribes to Congress the senseless goal of subjecting only unconstitutional ordinances to the Act. It also misperceives the issue in this case, which as the Ninth Circuit correctly ruled "is not whether Edmonds' ordinance could withstand a constitutional challenge * * * [but] whether Congress intended to apply the substantive standards of the FHAA to the ordinance." Pet. App. A at 2565. Congress may by statute confer rights additional to those in the Constitution, and that is precisely what it did in the FHAA.

G. Because the Ninth Circuit's construction of § 3607 (b)(1) is supported by the words of the statute and gives the exemption a meaning that is most in harmony with the overall structure and purpose of the FHAA and related federal law, it should be adopted even assuming that the City's construction is plausible based solely on the plain language of § 3607(b)(1). The Fair Housing Act is to be given a "generous construction," *Trafficante*, 409 U.S. at 209; exemptions to remedial statutes should be read narrowly; and it is "well settled doctrine * * * to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro* v. *United States*, 355 U.S. 1, 31 (1948).

II.

The legislative history confirms our view. The sole Congressional report on the FHAA shows that Congress expressly intended that "the prohibition against discrimination against those with handicaps [would] apply to zoning decisions and practices"—and, in particular, to those that bar handicapped persons from group homes by imposing restrictions "on congregate living arrangements among non-related persons with disabilities." H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185; Jt. App. at 147-48. Indeed, prior to reporting out the bill that became the FHAA, the House Judiciary Committee rejected an amendment to exempt zoning restrictions enacted without discriminatory intent, and the amendment's supporters voted against the FHAA because of its "impact on state and local government zoning authority." *Id.* at 89; 1988 U.S.C.C.A.N. at 2224.

The legislative history also confirms that Congress' use of the words "occupy" and "the maximum number of occupants" in § 3607(b)(1) was intended to exempt not "use" restrictions but true "occupany" restrictions applicable to all occupants and enacted to prevent health and

safety problems caused by overcrowding. In describing the exemption the House Report noted that "[a] number of jurisdictions limit the number of occupants per unit *based on a minimum number of square feet in the unit or the sleeping areas of the unit*," and stated that such limitations "would be allowed to continue, *as long as they were applied to all occupants*." *Id.* at 31; Jt. App. at 162-63 (emphasis added). In short, the legislative history leads down a single path to the same conclusion reached earlier on consideration of the statutory language —that the Ninth Circuit's construction of § 3607(b)(1) is correct.

III.

The City's ordinance is not exempt under § 3607(b)(1). By its own terms it is a "use" restriction, not an "occupancy" restriction. Jt. App. at 225-26, and the City itself observes that the word "family," over which Oxford House-Edmonds stumbles, is defined in the ordinance "for the purposes of the '*use*' provisions of the code." Pet. Br. at 3 (emphasis added). Moreover, the City elsewhere has adopted a true occupancy restriction prescribing specific square footage requirements "[w]here more than two persons occupy a room used for sleeping purposes," ECDC § 19.10.000 (Jt. App. at 248, adopting the 1991 Uniform Housing Code)—a restriction that *would* be exempt under § 3607(b)(1).

IV.

Like the City and its supporting *amici*, the Eleventh Circuit in *Elliott* v. *City of Athens*, 960 F.2d 975 (11th Cir. 1992), reasoned incorrectly that because this Court has upheld the constitutionality of single family zoning ordinances like the one at issue there (and here), they are the kind of restrictions Congress must have meant to exempt from the Act. *Id.* at 979-81. The court then determined that the ordinance was "reasonable" under § 3607(b)(1) by essentially engaging in a constitutional analysis, balancing the municipality's interests against the interests of handicapped persons and concluding that, be-

cause some areas in the city were not closed off, the city had "preserved meaningful access for group homes for handicapped persons in its residential areas." *Id.* at 983. That analysis mistakenly equated "reasonable" under § 3607(b)(1) with "constitutional" and "nondiscriminatory," and it confused the issue of compliance with the issue of exemption. Moreover, the court erred in ruling that § 3607(b)(1) "is an attempt on the part of Congress to advance the interests of the handicapped without interfering seriously with reasonable local zoning." *Id.* Congress *did* intend to interfere with local zoning that excludes persons with disabilities from residential areas, particularly those who need to live in group homes. In short, *City of Athens* construed the Act to defeat rather than serve its purposes by allowing cities to segregate group homes or exclude them altogether, and should not be adopted.

ARGUMENT

I. THE PLAIN LANGUAGE OF § 3607(b)(1) DOES NOT EXEMPT THE CITY'S ORDINANCE.

The City would construe § 3607(b)(1) broadly to exempt its single family zoning ordinance from the Act—and, accordingly, similar ordinances "in place in the majority of communities throughout the country." Pet. Br. at 6. That construction would permit all those communities to ban group homes for handicapped persons. The Ninth Circuit construed § 3607(b)(1) narrowly to exempt only health and safety related restrictions that apply uniformly to all occupants of a dwelling, such as square footage occupancy restrictions found in housing codes. That construction preserves legitimate health and safety occupancy restrictions without putting vast areas of the Nation's housing off limits to many handicapped persons.

In choosing between the two constructions, "[t]he starting point * * * is the language itself." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979) (citations and internal quotation marks omitted). Section

3607(b)(1) exempts "restrictions regarding the maximum number of occupants permitted to occupy a dwelling." In our view those words, standing by themselves, do not tell us whether the City's or the Ninth Circuit's construction is correct. They must be read, however, not by themselves but "with[] reference to the statutory context." *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (footnote omitted). "Over and over [this Court has] stressed that '[i]n expounding a statute, [it] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents*, 113 S. Ct. 2173, 2182 (1993) (citation omitted). As we shall show, when § 3607(b)(1) is read in the overall context of the FHAA, and Congress' contemporaneous efforts to foster group homes for Oxford Houses and the chance for other handicapped persons "to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens," its meaning is clear.

A. The Broad Language And Overall Policy Of The FHAA Provide Sweeping Protections For Handicapped Persons.

The FHAA is a remedial statute prohibiting housing discrimination based on handicap or familial status. It expands an act originally drafted in "broad and inclusive" language which is to be given a "generous construction" in order to carry out a "'policy that Congress considered to be of the highest priority.'" *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212, 211 (1972) (citation omitted); see also *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380 (1982). The added protections for handicapped individuals are also written broadly. The FHAA forbids discrimination on the basis of a handicap "in the sale or rental" of a dwelling, or "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling." 42 U.S.C. § 3604(f)(1)-(2). It is also

unlawful "to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." *Id.* § 3604(f)(1). Those prohibitions echo the ones applicable to other persons protected under the Fair Housing Act. See *id.* § 3604(a)-(b). But for handicapped persons Congress went further and defined "discrimination" to include—

> "(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises * * * necessary to afford such person full enjoyment of the premises * * *;
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> "(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [handicapped] person equal opportunity to use and enjoy a dwelling; or
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> "(C) * * * a failure to design and construct [covered multifamily] dwellings in such a manner that [they are readily accessible to handicapped persons] * * *." 42 U.S.C. § 3604(f)(3)(A)-(C).

These provisions confer on handicapped persons additional protections not afforded to any other class covered by the Act. The "reasonable accommodation" provision in subsection (B) has been widely construed to require municipalities to make exceptions to zoning ordinances when necessary to accommodate the housing needs of handicapped persons.[7]

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[7] *E.g.*, *Bangerter* v. *Orem City Corp.*, No. 92-4150, 1995 U.S. App. LEXIS, at 471 *28-29 (10th Cir., Jan. 11, 1995); *Horizon House Developmental Servs., Inc.* v. *Township of Upper Southampton*, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *Oxford House-C* v. *City of St. Louis*, 843 F. Supp. 1556, 1581 (E.D. Mo. 1994); *United States* v. *City of Philadelphia*, 838 F. Supp. 223, 228 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1488 (3d Cir. 1994); *North Shore-Chicago Rehabilitation, Inc.* v. *Village of Skokie*, 827 F. Supp. 497, 499-500 (N.D. Ill. 1993); *Oxford House, Inc.* v. *Town of Babylon*, 819 F. Supp. 1179, 1186 (E.D.N.Y. 1993); *Oxford House, Inc.* v. *Township of Cherry Hill*, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

The breadth of the Act's antidiscrimination provisions in general, and the special status conferred on handicapped persons by the provisions just mentioned, support the Ninth Circuit's construction of § 3607(b)(1). That construction gives maximum effect to the broad remedial purposes of the FHAA and is faithful to the rule that exemptions to remedial statutes must "be narrowly construed." *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945).[8]

B. Congress Intended The FHAA To Apply To Zoning Ordinances And Knew That Many Handicapped Persons Must Live In Group Homes In Residential Neighborhoods.

The Congress that enacted the FHAA knew that zoning ordinances had been successfully challenged under the original Act. Section 3615 ("Effect on State laws") declared inconsistent state and local laws invalid,[9] and by 1988 many decisions, some relying expressly on that provision, had enjoined enforcement of discriminatory zoning ordinances.[10] Congress is presumed to have been aware

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[8] "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips*, 324 U.S. at 493.

[9] That provision states among other things that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this [Act] shall to that extent be invalid." 42 U.S.C. § 3615.

[10] *E.g.*, *Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15 (1988) (zoning ordinance restricting location of multifamily housing projects had disparate impact on minorities); *United States* v. *City of Parma*, 661 F.2d 562, 572 (6th Cir. 1981) (citing § 3615 in applying the Act to municipalities, and upholding invalidation of discriminatory ordinance); *Metropolitan Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1294 & n.12 (7th Cir. 1977) (holding that "the Village's zoning powers must give way to the Fair Housing Act" and citing § 3615); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1188 (8th Cir. 1974) (enforcement of discriminatory ordinance enjoined under authority

of "this well-established judicial interpretation" when it extended the Act's protections to handicapped persons, and to have endorsed the Act's coverage of local zoning ordinances when it reenacted § 3615 without change. See, *e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 385-86 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381 (1982); *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978).

The 1988 Amendments themselves further demonstrate Congress' intent to subject zoning ordinances to the Act. Section 3610(g)(2)(C) directs the Secretary of HUD to refer to the Attorney General any matter that "involves the legality of any State or local zoning or other land use law or ordinance." Hence no one can doubt that, in enacting the FHAA, Congress meant for local zoning ordinances to continue to be covered by the Act.

Congress also was aware that many of the handicapped persons to whom it was extending the Act's protections cannot live alone but require group living arrangements in residential areas. Beginning in the 1960's, medical and social service professionals gained a better understanding of the capabilities and needs of individuals with disabilities. They came to understand that institutional life impairs these individual's motor, learning, communication, and general social skills,[11] whereas life in the community exposes them to "the patterns of life and conditions of everyday living which are as close as possible to the

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of § 3615); *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970).

[11] Faber, *Mental Retardation, Its Social Context and Social Consequences* (1968); Woloshin *et al.*, *The Institutionalization of Mentally Retarded Men Through the Use of a Halfway House*, J. Ment. Retard. 21 (June 1966); Tizard, *Community Services for the Mentally Retarded* (1964); Dentler & Mackler, *The Socialization of Institutional Retarded Children*, 2(4) J. Health Human Behavior 243 (1961); Phillips & Bathazar, *Some Correlates of Language Deterioration in Severely and Profoundly Retarded Long-Term Institutionalized Residents*, 83 Am. J. Mental Deficiency 402-408 (1979)).

regular circumstances and ways of life of society"[12] and offers opportunities for normal social integration and interaction that maximize their ability to achieve their human potential and become contributing members of society.[13] In 1983 a survey by the U.S. General Accounting Office found that the single most important siting factor for group homes for mentally disabled persons was a safe neighborhood, followed by neighborhood stability and a high percentage of single family residences within the neighborhood.[14] And two years later, in *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), this Court noted the district court's findings that:

> "Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community." *Id.* at 438 n.6.

Justice Marshall, concurring in part and dissenting in part, wrote:

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[12] Steinman, *The Impact of Zoning on Group Homes for the Mentally Disabled: A National Survey*, at 1, ABA Section of Urban, State, & Local Gov't Law (1986) (citing Nirje, "The Normalization Principle," in *Changing Patterns in Residential Services for the Mentally Retarded*, at 231 (Kugel & Shearer rev. ed. 1976)); Butler & Bjaanes, "Activities and the Use of Time By Retarded Persons in Community Care Facilities," in *Observing Behavior: Theory and Application in Mental Retardation*, at 379-80 (Sackett ed. 1978).

[13] Jaffe & Smith, American Planning Ass'n, Planning Advisory Serv. Rep. No. 397, *Siting Group Homes for Developmentally Disabled Persons*, at 4 (Hecimovich ed. 1986); Cournos, M.D., *The Impact of Environmental Factors on Outcome in Residential Programs*, 38(8) Hosp. & Community Psychiatry 848 (Aug. 1987).

[14] U.S. General Accounting Office, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled*, App. 1, at 9 (1983).

> "For retarded adults, this right [to establish a home] means living together in group homes, for as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community. * * * Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment—the ability to form bonds and take part in the life of a community." *Id.* at 461.

Congress recognized the importance of the deinstitutionalization movement in 1984 by enacting the Developmental Disabilities Assistance and Bill of Rights Act. Pub. L. No. 98-527, 98 Stat. 2662. That Act provides financial assistance to States to support persons with developmental disabilities "to achieve their maximum potential through increased independence, productivity, and integration into the community." 42 U.S.C. § 6021. It states this finding:

> "The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6009(2)(1988).

In 1987 Congress further amended that Act and added this finding:

> "[I]t is in the national interest to offer persons with developmental disabilities the opportunity, to the maximum extent feasible, to make decisions for themselves and to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens." Pub. L. No. 100-146, tit. I, § 101(8), 101 Stat. 840, 841 (codified as amended at 42 U.S.C. § 6000(a)(9) (Supp. V 1993)).

Thus by 1988, when Congress extended fair housing rights to handicapped persons, it knew of the great importance to many of those persons of group homes in residential communities.

This background counsels against construing § 3607 (b)(1) to exempt zoning ordinances that exist in "thousands [of cities] throughout our nation." Pet. Br. at 8. That construction would permit all those communities to declare themselves off limits to persons whose handicaps require group living—including individuals who are mentally retarded, elderly, physically disabled, or recovering alcoholics and addicts. It would exempt even ordinances enacted intentionally to discriminate against handicapped individuals.[15] And its construction would frustrate the national policy, stated in the Developmental Disabilities Assistance and Bill of Rights Act, of enabling developmentally disabled persons—who are handicapped within the meaning of the FHAA—"to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens."

The City's construction of the exemption would also undermine the purposes of the Anti-Drug Abuse Act, which was enacted two months after the FHAA by the same Congress explicitly to foster group homes for recovering alcoholics and addicts such as Oxford Houses. Through the Anti-Drug Abuse Act Congress "directly endorsed Oxford House itself as an organization worthy of public support because of its role in helping to stem the national epidemic of alcohol and drug abuse." *Oxford House, Inc.* v. *Township of Cherry Hill*, 799 F. Supp. 450, 465 (D.N.J. 1992).

Thus, the City's broad construction of § 3607(b)(1) would nullify or negate (i) the broad protections generally afforded handicapped persons under the FHAA, (ii) Con-

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[15] That dismaying result cannot be avoided by arguing that an ordinance adopted with discriminatory intent could not be "reasonable" under § 3607(b)(1). "Reasonable" must mean something other than "nondiscriminatory," for a nondiscriminatory ordinance does not violate the Act and has no need for the exemption. Thus, because a discriminatory zoning ordinance would not necessarily be unreasonable under § 3607(b)(1), the City's construction could indeed immunize intentionally discriminatory ordinances.

gress's plainly expressed intent to reach rather than exempt zoning ordinances, (iii) its encouragement of group homes in residential communities for developmentally disabled persons, and (iv) the Anti-Drug Abuse Act's support for group homes such as Oxford Houses. Given these consequences, the City's construction should be adopted only if the language of § 3607(b)(1) clearly expresses Congress' intent effectively to deny or drastically restrict housing in thousands of communities across the country for handicapped persons who need to live in group homes. As we shall see, however, the words of § 3607(b)(1) look the other way.

C. The Language Of The Exemption Supports The Ninth Circuit's Construction.

On its face the statute says nothing about zoning ordinances. What Congress did exempt were—

> "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

As we noted above, that language read in isolation does not tell us whether Congress intended to exempt use restrictions found in zoning ordinances or health and safety related occupancy restrictions found in housing codes. The City and its supporting *amici* contend that the City's ordinance is exempt under a plain meaning analysis because, in defining families, the ordinance does have the effect of limiting the maximum number of unrelated people who may live in a house. As we have seen, however, that construction flies in the face of the overall language of the FHAA and the context in which it was enacted. It is also doubtful as a matter of textual analysis. Congress exempted only restrictions on "the maximum number of occupants," not the maximum number of *some* categories of occupants but not others, and not "a" maximum applicable to some but not all occupants. The City's and its *amici*'s construction imputes to Congress a willingness to distinguish among prospective occupants that is not revealed on the face of the statute. Hence their approach gives a debatable meaning to the words of § 3607(b)(1), construes an exemption to a remedial statute broadly rather than narrowly, and produces a result contrary to the Act's overall purposes.

By contrast, the Ninth Circuit's narrower construction of the exemption "best harmonizes with [the] context and promotes [the] policy and objectives of [the] legislature." *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 574 n.10 (1991) (internal citation omitted). It is also supported by the language of § 3607(b)(1), which by employing the terms "occupants" and "occupy" is written in the terms of an "occupancy" restriction rather than a "use" restriction. As the Ninth Circuit noted, those two kinds of restrictions differ. Pet. App. A. at 2554-55 n.3. "Use" restrictions are embodied in zoning codes:

> "Zoning is the process by which a municipality legally controls the *use* which may be made of property and the physical configuration of development upon tracts of land within its jurisdiction. Zoning ordinances are adopted to divide the land into different districts, and to permit only certain *uses* within each zoning district." 1 Rohan, *Zoning and Land Use Controls* § 1.02[1], at 1-6 (1992) (emphasis added; footnotes omitted); see also *id.* § 1.02[1], at 1-7.

"Occupancy" restrictions, on the other hand, are generally set forth in housing codes:

> "Housing codes * * * set minimum standards for the occupancy of residential units. Items covered in such codes may include minimum space per occupant, lighting and ventilation requirements, and specific sanitary and heating facilities. The major purpose of housing codes is to prevent overcrowding and the blighting of residential dwellings." *Id.* § 1.02[6][c], at 1-34 to 35 (footnote omitted).

Use and occupancy restrictions arose from markedly distinct historical concerns and their different purposes have frequently been noted by courts and commentators.[16]

Section 3607(b)(1) reflects this distinction and is written in the language of a housing code. Indeed, at least one model housing code has remarkably similar language. Section 2.51 of the model code promulgated in 1986 by the American Public Health Association and Center for Disease Control defines the "[p]ermissible occupancy" of a dwelling as "the maximum number of individuals permitted to reside in a dwelling unit." [17]

The Secretary of Housing and Urban Development ("HUD"), who is charged with administering the Act and has jurisdiction over private occupancy restrictions (see p. 3, *supra*), also considers § 3607(b)(1) to exempt the kinds of occupancy limitations found in housing codes. HUD issued regulations implementing the FHAA that incorporated § 3607(b)(1) verbatim. 24 C.F.R. § 100.10(a)(3). The Preamble to the regulations explains that private sellers and lessors of real estate urged HUD to adopt a "national occupancy code" that they could enforce when state or local governments had failed to enact an occupancy restriction exempted by § 3607(b)(1). HUD declined to promulgate such a regulation, and in explaining why demonstrated its understanding of the kinds of restrictions that would be exempt:

> "[T]he Department believes that in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based

[16] For a full discussion of the differences between the two restrictions, including differences in the extent to which they have been used to discriminate against disfavored classes, see the Brief of the National Fair Housing Alliance as *Amicus Curiae* in Support of Respondents.

[17] E. Mood, American Public Health Association—Centers for Disease Control, *Recommended Minimum Housing Standards* (1986).

> on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit." 24 C.F.R. ch. I, subch. A, App. I.

In short, there is every reason to believe that, when it preserved the applicability of "restrictions regarding the maximum number of occupants permitted to occupy a dwelling," Congress intended to adopt this common interpretation of maximum occupancy restrictions as establishing a maximum number of occupants based on the amount of space in the dwelling—regardless of the character of that occupant—to prevent the health and safety problems caused by overcrowding.[18]

The Ninth Circuit's interpretation also gives consistent meaning to the word "restriction" in § 3607(b)(1), whether it is a "local, State, or Federal" restriction. Regulation of property uses through zoning ordinances is principally a local phenomenon. Neither state governments nor the federal government typically regulates the number of permissible occupants of a dwelling under land use regulations. State governments do, however,

[18] The Court should accordingly reject the City's contention (Pet. Br. 8, 11) that the words "occupants" and "occupy" reflect Congress' intent to exempt single family zoning ordinances because this Court referred to such ordinances as "occupancy" restrictions in *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977). *Moore* was not construing a statute, and in fact the opinions in that case recognized the distinction between zoning ordinances and the square-footage type of restriction that the Ninth Circuit ruled § 3607(b)(1) was actually meant to cover. See 431 U.S. at 500 n.7 ("another ordinance * * * limits population density directly, tying the maximum permissible occupancy of a dwelling to the habitable floor use") (opinion of Powell, J., joined by Brennan, Marshall, and Blackmun, JJ.); *id.* at 520 n.16 ("East Cleveland had on its books an ordinance requiring a minimum amount of floor space per occupant in every dwelling") (Stevens, J., concurring in the judgment); *id.* at 539 n.9 (noting that the city's housing code provision, in contrast to its zoning ordinance, "is directed not at preserving the character of a residential area but at establishing minimum health and safety standards.") (Stewart and Rehnquist, JJ., dissenting).

regulate permissible occupancy based on health and safety concerns, sometimes by adopting the Uniform Housing Code and its square footage occupancy restrictions.[19] And different agencies of the federal government impose similar restrictions in connection with their administration of various housing programs.[20] Construing § 3607(b)(1) as the Ninth Circuit did imparts the same generic mean-

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[19] See Cal. Health & Safety Code § 17922 (Deering 1994); Iowa Code § 364.17 (1993); Mont. Admin. R. 8.70.102 (1994); Nev. Rev. Stat. Ann. § 461.170 (Michie 1993); Or. Rev. Stat. § 455.410 (1993); see also Brief of the American Planning Association as *Amicus Curiae* in Support of Respondents.

Section 503(b) of the Uniform Housing Code states that bedrooms "shall have an area of not less than 70 square feet" and that "[w]here more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two." Jt. App. at 180.

[20] For example, to ensure that buildings used in its Section 8 lower-income housing program are "decent, safe, and sanitary," 42 U.S.C. § 1437f(o)(5), HUD regulations require that a "dwelling unit shall afford the Family adequate space and security," 24 C.F.R. § 882.109(c), and that:

> "The dwelling unit shall contain a living room, kitchen area, and bathroom. The dwelling unit shall contain at least one bedroom or living/sleeping room of appropriate size for each two persons. Persons of opposite sex, other than husband and wife or very young children, shall not be required to occupy the same bedroom or living/sleeping room." Id. § 882.109(c)(2); see also id. §§ 886.113(c), 887.251(c) (imposing like requirements).

Similarly, the Employment and Training Administration of the Department of Labor has established space requirements for agricultural housing. See 20 C.F.R. § 654.407(c)(1)-(3) (imposing 40, 50, and 60 square foot requirements for different living conditions). And the Farmers' Home Administration of the Department of Agriculture, in the management of Rural Rental Housing projects, has issued similar health and safety oriented regulations. See 7 C.F.R. Part 1930, Subpt. C, Exh. B (no more than "2 people per *habitable sleeping room*," unless "a habitable sleeping room provides at least 50 square feet per person") (emphasis in original).

ing to the term "restriction" whether it is a "State restriction" or a "Federal restriction" or a "local restriction." That satisfies the canon of construction that "a word is presumed to have the same meaning" throughout a statute. *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983).

Several *amici curiae* contend that the City's broad construction is compelled by the word "any" in § 3607(b)(1), arguing that its presence means that Congress meant to exempt all restrictions whether found in use ordinances or housing codes.[21] But that is too much weight for that word to bear. If it were absent we doubt that *amici*'s arguments about § 3607(b)(1) would change, and in any event "a single word cannot be read in isolation." *Smith* v. *United States*, 113 S. Ct. 2050, 2056 (1993). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purpose from the setting in which they are used * * *." *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (internal citation omitted).

We believe that the word "any" says little if anything about the kinds of restrictions Congress meant to exempt. The word may represent the drafters' wish to underscore that State *and* Federal *and* local restrictions were covered; alternatively, it may mean "any" kind of true occupancy restriction, whether expressed in terms of allowable persons per square foot or per bedroom or other living space.[22] But in all events the word "any" should not be construed to singlehandedly demonstrate an otherwise unexpressed congressional intent to exempt thousands of single family

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[21] Brief of Township of Upper St. Clair, at 6-8; Brief of Lubbock, Texas at 4; Brief of International City/County Management Assoc., *et al.*, at 11.

[22] Cf. the HUD Preamble, p. xx, *supra*, describing appropriate restrictions in terms of "the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit."

zoning ordinances covering the areas presumptively most important to handicapped persons requiring congregate living arrangements.[23]

Nor, contrary to the view of one *amicus curiae*, does the exemption in § 3603(b) of the Act for some single family dwelling owners support the City's interpretation.[24] Congress' willingness in that section to exempt *some* individual owners who decline to sell or rent to the classes of persons covered by the Act may remove a limited number of dwellings from the reach of handicapped persons. But that narrow exemption does not remotely suggest that Congress intended in § 3607(b)(1) to permit a city to remove an entire community of houses from the reach of groups of handicapped persons.

D. The Reasonableness Requirement Of § 3607(b)(1) Supports The Ninth Circuit's Construction.

Section 3607(b)(1) exempts only "reasonable" restrictions on maximum occupancy. "Reasonable" is a relative term, dependant on the context and circumstances in which it is used. Given the overall purposes of the Act, and the

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[23] In other cases this Court has refused to read "any" literally when doing so would make no sense in the context of the overall statutory scheme. See *Georgia* v. *Rachel*, 384 U.S. 780, 792 (1966) (construing the language "any law providing for * * * equal civil rights" in 28 U.S.C. § 1443 to mean only laws "providing for specific civil rights stated in terms of racial equality"); *McNally* v. *United States*, 483 U.S. 350 (1987) (holding that "any scheme or artifice to defraud" does not include a scheme to deprive one of intangible rights); see also *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 634-35 (1979) (Powell, J., concurring, joined by Burger, C.J. and Rehnquist, J.) (statutory reference to "any law of the United States" refers only to equal rights laws).

[24] Brief of Township of Upper St. Clair, at 15-16. Section 3603(b)(1) provides that the Act does not apply to the sale or rental of a single family dwelling provided that the owner owns three or fewer such dwellings and does not use the services of a broker in the sale or rental. 42 U.S.C. § 3603(b)(1).

limited kinds of restrictions we have shown Congress meant to exempt, whether an occupancy restriction is reasonable within the meaning of § 3607(b)(1) ought to turn on whether it is drafted to serve the health and safety concerns typically addressed in uniform housing codes. That is a simple test to administer.

By contrast, it is difficult to fashion an appropriate test for "reasonableness" if Congress meant for § 3607(b)(1) to exempt zoning ordinances like the City's. The City and several of its supporting *amici* ask the Court to apply "the constitutional reasonableness standard of the Fourteenth Amendment Due Process and Equal Protection Clauses." Pet. Br. at 10, 11.[25] Their position seems to be that, if a zoning ordinance is constitutional, it is exempt from the Fair Housing Act. If that were true it would mean that the FHAA gave handicapped persons needing to live in group homes no protection the Constitution did not already provide, and that Congress intended the Act to reach only unconstitutional ordinances, which would make no sense. And it would mean that municipalities could exclude group homes for handicapped persons altogether, which, as we have shown above, would be contrary to Congress' intent.

Uncomfortable with that result, the City tries to narrow it by contending that a single family ordinance covering an entire city would not be reasonable because "it would result in the total exclusion of the group homes for the disabled from the community." Pet. Br. at 18. But the ordinance held constitutional in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), limited to two the number of unrelated persons who could reside in a dwelling, thus excluding all group homes. Hence the City's two contentions—that constitutional ordinances are exempt but wholly exclusory ones are not—contradict each other.

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[25] See also Brief of the International City/County Management Assoc., *et al.*, at 15 n.7; Brief of Pacific Legal Foundation, at 13-15; Brief of City of Mountlake Terrace, Washington, at 7-8; Brief of City of Fultondale, Alabama, at 7-9.

Moreover, the City and its *amici* conflate the question whether an ordinance is exempt with the question whether it violates the substantive prohibitions of the Act. The City's defense of its ordinance as generally accepting of handicapped persons, and *amici*'s arguments that the ordinance reflects a reasonable balancing of various factors and is more generous to group homes than the ordinance upheld in *Village of Belle Terre*,[26] all essentially contend that an ordinance is reasonable within § 3607(b)(1) if it does not discriminate. Those arguments impermissibly equate "reasonable" with "nondiscriminatory." As we noted above (note 15), whether an occupancy restriction is reasonable under § 3607(b)(1) cannot turn on whether it is discriminatory, for Congress had no need to exempt occupancy restrictions that do not discriminate and thus by definition do not violate the Act. Hence the City's and its *amici*'s portrayal of the ordinance as fair to handicapped persons, while possibly relevant to the question whether it violates the Act, has no bearing on the question whether it is "reasonable" and thus exempt under § 3607(b)(1).

If the reasonableness of an ordinance *does* turn on the degree to which it discriminates, consider the issues courts will be called upon to resolve. The City asserts that an ordinance that totally excluded group homes from the community would be unreasonable, but that its ordinance, said to cordon off only 75 percent of housing, is not. (In fact the more accurate figure is 97 percent.[27]) By

[26] Pet. Br. at 28-30; Brief of International City/County Management Assoc., *et al.*, at 15; Brief of Pacific Legal Foundation, at 13-15.

[27] The City variously states that 186 or 258 single-family rental houses are available to Oxford House in the City's multi-family zones (Pet. Br. at 5, 27). Neither number is accurate. 258 is the *total* number of single family residences in the multi-family zones (Jt. App. at 113); only some of them are rental properties. As the City notes (Pet. Br. at 27, citing Jt. App. at 122), there are 8,550 single family housing units throughout the City, of which 967, or 11.3%, are rental properties. Applying the same percentage

what yardstick is a total exclusion unreasonable but a near total exclusion acceptable? Does it matter whether the area open to disabled persons is run down, or the site of illicit drug activity and other crime? The City defends the areas in which it would allow an Oxford House to locate, arguing that the record contains no evidence that they "are in any way unsuited to Oxford House's program." Pet. Br. 27, 31. It is hard to believe that Congress intended that, in considering whether a restriction falls within § 3607(b)(1), a court would have to take evidence on such issues.

In short, the difficulty of divining an appropriate test for the reasonableness of a zoning ordinance under the City's construction of § 3607(b)(1)—a test that does not equate reasonableness with "constitutional" or "discriminatory" and that would not collapse the exemption issue into the merits—further supports the Ninth Circuit's construction.[28]

to the 258 single family houses in multi-family zones shows that only 29 houses are rental properties. Thus the City has declared off limits 97% of the single family homes available for rent. (29=3% of 967). With 97% of the potential housing stock off-limits, the chances of finding a house that is large enough, suitably located, *and vacant* are virtually nil.

[28] Even as a merits defense to a charge of discrimination, the City's argument that a court should consider the availability of other housing for handicapped persons badly misconstrues the Act. Shunting group homes to alternative housing in a different neighborhood is inconsistent with the goals of deinstitutionalization and does not provide "equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B); see also 24 C.F.R. § 100.204(b) (HUD's examples of reasonable accommodations under the Act focus on the specific dwelling desired by the disabled person). Rather, "[a]nti-discrimination laws are designed to prevent just such discriminatory segregation." *Oxford House-Evergreen* v. *City of Plainfield*, 769 F. Supp. 1329, 1344 (D.N.J. 1991); see also *United States* v. *Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992) ("[T]he issue is not whether any housing was made available to [the handicapped individual], but whether she was denied the housing she desired on impermissible grounds."); *Horizon House Developmental Servs., Inc.*, 804 F. Supp. at 698 ("[T]he FHAA rejects any notion that a

E. The Ninth Circuit's Construction Will Not Destroy Single Family Zoning Ordinances.

The City contends that the Ninth Circuit's interpretation if accepted will "overturn Euclidian zoning," "destroy the effectiveness and purpose of single-family zoning," and "destroy the basic building block of zoning." Pet. Br. at 11, 25, 30. Several *amici curiae* sound similar alarms.[29] But those apocalyptic views have no basis. To say that single family zoning ordinances are not exempt from the Act is not to strike them down. It means only that they may be challenged under the Act's prohibitions against discrimination found in § 3604(f)(1)-(3). A zoning ordinance could be struck down entirely only upon proof that it was enacted or enforced with discriminatory intent,[30] or produced a disparate impact on disabled persons,[31] and the more likely claim by handicapped persons requiring a group home is the narrower one made in this case, that the City has violated § 3604(f)(3)(B) by refusing to make a reasonable accommodation in its ordinance. If the decision below is affirmed, and on remand the respondents prove their claim, the City will be required only to make an exception to its ordinance for the residents of Oxford House-Edmonds. It will remain otherwise

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Township can somehow avoid the anti-discrimination mandate by accepting some sort of 'fair share' or apportionment of people with disabilities."). Accordingly, what the City views as magnanimity—its consideration during this litigation of where to permit group homes and its relegation of them to areas zoned for multifamily housing only (see Pet. Br. at 5, 21)—may instead reflect intentional discrimination against persons with disabilities.

[29] See Brief of City of Fultondale, Alabama, at 6 ("Fultondale finds its legally legislated zoning ordinance being destroyed!"); Brief of Pacific Legal Foundation, at 29 (Ninth Circuit's interpretation "leaves many local governments with the choice of either redrafting their zoning laws or having the federal government unduly intrude into their land use decisions").

[30] Cf. *United States* v. *City of Parma*, 661 F.2d 562 (6th Cir. 1981 (striking down a racially discriminatory ordinance).

[31] Cf. *Metropolitan Housing Dev. Corp.*, 558 F.2d at 1290; *Horizon House Developmental Servs., Inc.*, 804 F. Supp. at 697-98.

free to enforce its ordinance against other group homes such as college fraternities and boarding houses.

Nor, contrary to the suggestion of one *amicus curiae*,[32] will the Ninth Circuit's construction impair the quality of life in single family neighborhoods. Numerous studies have evaluated the actual impact of group homes on their surrounding communities. Their findings are consistent: the presence of group homes in the areas studied has not lowered property values or increased the rate of turnover; has not increased crime; and has not changed the character of the neighborhood. Nor have the homes deteriorated or become conspicuous institutional landmarks. Communities have come to accept them, and group home residents have benefitted from access to community life.[33]

These findings do not turn on the nature of the disability involved. The studies have addressed group homes for persons who are mentally retarded or developmentally disabled, mentally ill, elderly, recovering drug addicts and alcoholics, ex-offenders, and a variety of combinations thereof.[34]

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[32] Brief of Pacific Legal Foundation, at 13-14.

[33] See Community Residences Information Services Program of White Plains, N.Y., *There Goes the Neighborhood . . . A Summary of [58] Studies Addressing the Most Often Expressed Fears About the Effects of Group Homes in Neighborhoods in Which They Are Placed: Declining Property Values, Crime, Deteriorating Quality of Life, and Loss of Local Control* (Normann ed. 1990) ("There Goes the Neighborhood"); see also in Lauber, *Impacts of Group Homes on the Surrounding Neighborhood: An Evaluation of Research* (Planning/Communications Aug. 1981) ("Impacts of Group Homes").

[34] See Human Services Research Institute, *Becoming a Neighbor: An Examination of the Placement of People with Mental Retardation in Connecticut Communities* (Mar. 1988), summarized in There Goes the Neighborhood at 29 (literature review revealing that group homes for the mentally retarded have no impact on property values, selling time or property turnover rates, nor on the character of the neighborhood or the crime rate); Lauber, *Impacts on the Surrounding Neighborhood of Group Homes for Persons with Developmental Disabilities* (Planning/Communications Sept. 1986)

F. The Ninth Circuit's Construction Is Not Inconsistent With This Court's Rulings On The Constitutionality Of Single Family Zoning Ordinances.

The City contends that § 3607(b)(1) "must be interpreted in the context of the U.S. Supreme Court's consistent direction in the field of single-family zoning." Pet. Br. at 11. It and various *amici* argue that, because this Court has recognized the broad zoning power of local

(group homes for the developmentally disabled do not affect the value of residential property or the stability of the surrounding neighborhood; group home residents pose no threat to neighborhood safety); Ryan, *An Examination of the Knowledge, Attitudes and Relationships of Selected Neighbors Toward Community Residential Facilities for the Developmentally Disabled in Westchester County, New York* (Oct. 1986) (unpublished dissertation, New York University), summarized in There Goes the Neighborhood at 70 (lack of impact on the neighborhood of community residential facilities for the developmentally disabled); *Impacts of Group Homes*, at 1 (proximity of group homes for mentally retarded/developmentally disabled, prison pre-parolees, mentally ill or recovering addicts and alcoholics has no effect on market values or turnover; maintenance of group homes is generally better than that of surrounding properties; group homes are consistent and compatible with the size and type of neighboring structures; and group homes have no effect on local crime); Louisiana Center for Public Interest, *Impact of Group Homes on Property Values in the Surrounding Neighborhoods* (Feb. 1981), summarized in There Goes the Neighborhood at 49 (survey of mental health homes, alcohol and drug centers, and ex-offender halfway houses in variety of neighborhoods found no decline in neighborhood character or property value; homes were integrated, well-maintained and inconspicuous); Sigelman *et al.*, *Community Reactions to Deinstitutionalization: Crime, Property Values and Other Bugbears*, J. Rehabilitation 52 (1979) (evidence indicates that crime rates do not increase in neighborhoods with residential facilities for the handicapped, property values do not decline, turnover rates do not increase, neighborhood lifestyles are not altered, resident/neighbor contacts are rarely negative, and neighbors become more favorably disposed toward facilities and their residents as a result of first-hand experience); City of Lansing Planning Dep't, *The Influence of Halfway Houses and Foster Care Facilities Upon Property Values* (Oct. 1976), summarized in There Goes the Neighborhood at 9 (no relationship between presence of a halfway house or foster home for ex-alcoholics, adult ex-offenders, youth offenders or mentally retarded and property values in the surrounding neighborhood).

governments and has upheld the constitutionality of single-family zoning ordinances under the Equal Protection Clause, *Village of Belle Terre*, Congress could not have intended to make such ordinances subject to the non-discrimination mandates of the Fair Housing Act. *Id.* at 9-11.[35] But the Ninth Circuit correctly held that "the question is not whether Edmonds' ordinance could withstand a constitutional challenge brought by unrelated persons as in *Belle Terre*. It is whether Congress intended to apply the substantive standards of the FHAA to the ordinance." Pet. App. A at 2565.

There can be no doubt of Congress' power to regulate even constitutional single family zoning ordinances. While Congress may not take away rights granted by the Constitution, it is certainly free to confer additional rights,[36] which is precisely what it did in the FHAA. As the Ninth Circuit noted, "Congress intended city zoning policies to reasonably accommodate handicapped persons * * * [which] can require something more than the enactment of minimally constitutional and facially neutral zoning ordinances."[37] Indeed, long before the 1988 Amendments, the Eighth Circuit noted that a constitutional ordinance could run afoul of the Fair Housing Act: "The discretion of local zoning officials, recently recognized in *Village of Belle Terre* * * * must be curbed where 'the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods' " in violation of the Act. *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974). The Tenth Circuit more recently made the same point in a case involving handicapped persons:

[35] See Brief of Pacific Legal Foundation at 8-9, 16-17; Brief of International City/County Mgmt. Assoc., *et al.*, at 15-17.

[36] See *City of Rome* v. *United States*, 446 U.S. 156, 177-78 (1980); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976).

[37] Pet. App. A at 2565-66; see also *Horizon House*, 804 F. Supp. at 695 n.6 ("the standard under the FHAA is a higher level of scrutiny than rational basis test applied to an equal protection analysis"); *Potomac Group Home Corp.* v. *Montgomery County*, 823 F. Supp. 1285, 1295 n.8 (D. Md. 1993) (same).

> "[T]he use of an Equal Protection analysis is misplaced here because this case involves a federal statute and not the Fourteenth Amendment. * * * Moreover, the FHAA specifically makes the handicapped a protected class for purposes of a statutory claim—they are the direct object of the statutory protection—even if they are not a protected class for constitutional purposes."

Bangerter v. *Orem City Corp.*, No. 92-4150, 1995 U.S. App. LEXIS, at 471 *33-34 (10th Cir., Jan. 11, 1995). In short, this Court's constitutional rulings offer no support for the City's broad construction of § 3607(b)(1).

The City also contends that its ordinance comes within the exemption because if it imposed a five-person limit on traditional family members it would violate the Due Process Clause, which requires family members to go unregulated. Pet. Br. at 22. That argument stands up only if Congress intended § 3607(b)(1) to exempt zoning ordinances. No constitutional problem arises if Congress meant to exempt only occupancy limitations expressed in person-per-square-foot or person-per-bedroom terms. No case of which we are aware has ever suggested that the Constitution would forbid the application to families of such historic, evenly drawn, true occupancy restrictions.[38] Indeed, *Moore* strongly suggests the contrary.[39]

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[38] "[T]he family is not beyond regulation." *Moore*, 431 U.S. at 499 (plurality opinion). See, *e.g.*, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (upholding constitutionality of law forbidding parent from causing child to violate the child labor laws); *Lyng* v. *Castillo*, 477 U.S. 635 (1986) (upholding federal regulations defining "household" to exclude relatives living outside nuclear family unless they customarily purchased food and prepared meals together).

[39] *Moore* struck down a zoning ordinance that limited occupancy to a few categories of relatives on the ground that it only marginally furthered its goal of preventing overcrowding. The plurality opinion found it "significant that East Cleveland has another ordinance specifically addressed to the problem of overcrowding," one that limited "population density directly [by] tying the maximum permissible occupancy of a dwelling to the habitable floor area." 431 U.S. at 500 n.7 (Opinion of Powell, J., joined by Brennan, Marshall, and Blackmun, JJ.). That opinion at least implicitly acknowledged the constitutionality of true occupancy restrictions applied to families. See also *id.* at 520 n. 16 ("To prevent overcrowding, a community can certainly place a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space.") (Stevens, J., concurring in the judgment).

G. Summary.

The words of § 3607(b)(1), read alone, do not immediately endorse either the City's broad or the Ninth Circuit's narrow construction. But the Ninth Circuit's view finds persuasive support in the words of the statute and it gives the exemption a meaning that is most in accord with the overall structure and purpose of the FHAA and related federal legislation. Accordingly, even assuming that the City has an equal claim for its interpretation based solely on the plain language of § 3607(b)(1), the Ninth Circuit's construction should be adopted, for the Fair Housing Act is to be given a "generous construction," *Trafficante*, 409 U.S. at 212; exemptions to remedial statutes should be read narrowly; and it is "well settled doctrine * * * to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro* v. *United States*, 335 U.S. 1, 31 (1948).

We recognize, however, that the Ninth Circuit found the statute ambiguous, and that there is an inter-circuit conflict on the meaning of the exemption. Accordingly, we turn now to the legislative history. As we shall see, it closes the door on the City's argument.

II. THE LEGISLATIVE HISTORY CONFIRMS THAT THE NINTH CIRCUIT'S CONSTRUCTION IS CORRECT.

The sole congressional report on the FHAA is H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173 ("H.R. Rep. No. 711"). That Report, which accompanied the bill enacted into

law, is "the authoritative [legislative history] source for finding the Legislature's intent" because it represents " 'the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' " *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (citation omitted).

Legislative history is often ambiguous and inconclusive. But in this case the House Report expressly supports the conclusions we reached in Part I above. It records Congress' belief that "[t]he right to be free from housing discrimination is essential to the goal of independent living" (H.R. Rep. No. 711 at 18; Jt. App. at 135), and its intent to foster "the ability of [handicapped] individuals to live in the residence of their choice in the community." *Id.* at 24; Jt. App. 148. It shows that Congress intended the Act to reach zoning ordinances in general and in fact actually targeted zoning ordinances that bar handicapped persons from residing in congregate living arrangements:

> "[The provisions outlawing discrimination against handicapped persons] would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements *on congregate living arrangements among non-related persons with disabilities.* Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.
>
> "The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." *Id.* at 24; Jt. App. at 147-48 (footnote omitted; emphasis added).

This passage confirms that Congress did not intend to permit communities to bar group homes for handicapped persons.[40] Congress' intent is also revealed by its rejection of an amendment that would have legislated the very interpretation proposed by the City. Before the House Judiciary Committee reported out the bill that became the FHAA, Representative Swindall proposed an amendment to exempt decisions by local governments "to zone real property as available for certain uses, such as commercial development or single-family homes" or to "grant or refus[e] to grant a variance," unless such zoning decision was made with an intent to discriminate. See H.R. Rep. No. 711 at 89, *reprinted in* 1988 U.S.C.C.A.N. at 2224 (additional views of Reps. Swindall and 5 others). The amendment was rejected, and its supporters voted

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[40] Because the footnote in this passage cites *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), the City contends that "Congress was trying to address a problem" presented by facially discriminatory ordinances like the one at issue in that case, and that its facially neutral ordinance must therefore be exempt under § 3607(b)(1). Pet. Br. at 19-21. The argument mistakenly assumes that Congress was discussing § 3607(b)(1) in that passage. *Id.* at 19. In fact the passage has nothing to do with the exemption, but instead explains the justification for some of the Act's anti-discrimination provisions. Moreover, in another passage following shortly thereafter, Congress specified that the Act *would* apply to facially neutral ordinances:

> "Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities. * * * These and similar practices would be prohibited." H.R. Rep. No. 711 at 24, Jt. App. at 148-49 (footnote omitted).

That passage, and Congress' rejection of a proposed amendment to exempt all but intentionally discriminatory ordinances (see text, *infra*), shows that the neutrality of the City's ordinance does not even mean that it complies with the Act, much less that it falls within the exemption.

against the FHAA because of the FHAA's "impact on state and local government zoning authority." *Id.*

Moreover, the legislative history shows that Congress meant to assure, not deny, handicapped persons access to "American life" and "the American mainstream," which surely includes the thousands of single family zoned communities in America. Thus the House Report states:

> "Prohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice.
>
> "The [FHAA], like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national committment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711 at 18; Jt. App. 134 (footnote omitted).[41]

And finally, the legislative history confirms that Congress' use of the words "occupy" and "the maximum number of occupants" in § 3607(b)(1) was intended to exempt "occupancy" restrictions that apply to all occupants to prevent health and safety problems caused by overcrowding, and not "use" restrictions. The House Report states:

> "Section [3607(b)(1)] amends [the Act] to make additional exemptions relating to the familial status provisions. These provisions are not intended to limit the applicability of any reasonable local, State, or

[41] The Report also recognizes the status of recovering drug addicts as handicapped (and, by implication, recovering alcoholics as well), and their need for stable housing:

> "Just like any other person with a disability, such as cancer or tuberculosis, former drug-dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status. Depriving such individuals of housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery." H.R. Rep. No. 711 at 22; Jt. App. at 144.

> Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictons limit the number of occupants per unit *based on a minimum number of square feet in the unit or the sleeping areas of the unit.* Reasonable limitations by governments would be allowed to continue, *as long as they were applied to all occupants*, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status." H.R. Rep. No. 711 at 31; Jt. App. at 162-63 (emphasis added).

The first sentence in that passage suggests that Congress may have enacted § 3607(b)(1) in response to a concern that the new familial status provisions would be interpreted to preclude landlords from enforcing occupancy restrictions to prevent overcrowding, and some commentators believe that the exemption saves occupancy restrictions *only* insofar as they limit the number of family members who may occupy a dwelling. See Mandelker, Gerard & Sullivan, *Federal Land Use Law*, § 3.09[2] (ed. 1993). While § 3607(b)(1) on its face does not mention familial status discrimination, this view of its origin strengthens the conclusion, borne out by the rest of the passage, that Congress intended to exempt only true occupancy restrictions—that is, those "based on a minimum number of square feet in the unit or the sleeping areas of the unit" and "applied to all occupants." See also 133 Cong. Rec. S2261 (daily ed. Feb. 19, 1987) (statement of Sen. Metzenbaum) ("The bill does not prevent governments from imposing safety and health related limitations on the number of persons who may occupy a housing unit.").

In short, the legislative history leads down a single path to the conclusion, reached earlier on consideration of statutory language alone, that the Ninth Circuit's construction of § 3607(b)(1) is correct.

III. THE CITY'S ORDINANCE IS NOT AN OCCUPANCY RESTRICTION WITHIN THE MEANING OF § 3607(b)(1).

The City's ordinance is not exempt under § 3607 (b)(1). By its own terms it is a "use" restriction, not an "occupancy" restriction. "Permitted Primary *Uses*" in the zone where Oxford House-Edmonds is located are limited to "[s]ingle-family dwelling units" (ECDC § 16.20.010 (emphasis added)) and, as the City itself accurately observes (Pet. Br. at 3), "ECDC Section 21.30.010 FAMILY defines 'family' for the purposes of the 'use' provisions of the code." Nothing in the record suggests that the City's ordinance was enacted to serve the kind of health and safety related concerns that are met by true occupancy restrictions expressed in terms of allowable persons per square foot of living space or sleeping areas.[42] Moreover, the City has elsewhere adopted such a restriction, prescribing specific square footage requirements "[w]here more than two persons occupy a room used for sleeping purposes." See ECDC § 19.10.000, adopting the 1991 Uniform Housing Code, ch. 5, § 503(b); Jt. App. at 248. That restriction *would* be exempt under § 3607 (b)(1), and its adoption by the City further demonstrates the distinction between zoning "use" ordinances and the kind of true occupancy restrictions Congress meant to exempt.

IV. *ELLIOTT* v. *CITY OF ATHENS* WAS WRONGLY DECIDED.

Elliott v. *City of Athens*, 960 F.2d 975 (11th Cir. 1992), the conflict-creating decision in this case, held that a zoning ordinance similar to the one at bar was exempt as a reasonable occupancy restriction.[43] Like the

[42] The City did not legislate based upon any finding of differential impact on its services or infrastructure; rather, its decision to limit the definition of "family" to five or fewer unrelated persons is not explained by any legislative findings. Jt. App. at 108-09.

[43] The ordinance limited an area of the City of Athens to single-family use and defined family in essence as one or more persons related by blood, marriage or adoption or no more than four unrelated persons. 960 F.2d at 976.

City in this case, the Eleventh Circuit reasoned that this Court's constitutional rulings on the subject of single family zoning ordinances somehow show that Congress meant to exempt such ordinances under § 3607(b)(1). *Id.* at 980. That reasoning is unpersuasive for the reasons given above at pp. 38-40. The Eleventh Circuit also erred in believing that its ruling was warranted by the prevalence and utility of ordinances distinguishing related from unrelated persons.[44] In fact, to the extent that such distinctions have been used to discriminate against group homes for persons with disabilities, their prevalence may be seen to have galvanized Congress into forbidding them. That is just what the House Report shows. See *supra* p. 42.

The Eleventh Circuit then engaged in a constitutional reasonableness analysis, setting the municipality's interests in controlling density, traffic, and noise and in preserving the residential character of the neighborhood against the interests of persons with disabilities in remaining free from a discriminatory zoning restriction. 960 F.2d at 981-84. The court found the evidence of disparate impact insufficient to render unreasonable "an otherwise reasonable zoning restriction." *Id.* at 984. This conclusion suffers from the infirmities we identified above: it equates "reasonable" under § 3607(b)(1) with "constitutional" and "nondiscriminatory," and it confuses the issues of compliance with the issue of exemption.

Moreover, the court profoundly misinterpreted the exemption in ruling that it "is an attempt on the part of

[44] The Eleventh Circuit noted the importance of "commonplace" unrelated-persons limitations to a college town like Athens. 960 F.2d at 980 & n.6, 982. But as we noted earlier (p. 36), the existence of those limitations is not at stake here. Even if on remand Oxford House-Edmonds obtains a reasonable accommodation of the City's ordinance, the City will remain free to control the number of unrelated college students who may rent a single dwelling.

Congress to advance the interests of the handicapped without interfering seriously with reasonable local zoning," and that, because there were other areas in the city available for group homes, the city had "preserved meaningful access for group homes for handicapped persons in its residential areas." *Id.* at 983. As we showed earlier (pp. 42-44), Congress *did* intend to interfere with local zoning because of its history of excluding persons with disabilities, particularly those needing congregate living arrangements. Moreover, the FHAA does not guarantee "meaningful" access to group housing generally: it requires "equal opportunity to use and enjoy *a dwelling*." 42 U.S.C. § 3604(f)(3)(B) (emphasis added). Thus, as demonstrated above (note 28), a city contravenes rather than satisfies the mandates of the FHAA when it segregates group homes for persons with disabilities into specific neighborhoods.

In sum, *City of Athens* approached and adjudicated an issue of statutory construction as if it were engaged in appraising a State statute under a lenient constitutional standard. It confused the question whether the city's ordinance violated the Act with the question whether it qualified as exempt under § 3607(b)(1), ascribed to Congress an overly tolerant attitude towards zoning ordinances that exclude group homes, and construed the Act to defeat rather than serve its purposes by allowing cities to segregate group homes or exclude them altogether. For these reasons *City of Athens* was wrongly decided and should not be adopted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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